

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of)	
)	
C&W COMMUNICATIONS, INC.)	File No. EB-02-IH-0643
)	
Licensee of Private Land Mobile Stations)	
WNJB566 and KNBV420)	
)	
STEVE GILL)	
)	
Licensee of Private Land Mobile Station)	
WNEC236)	
)	
RADIO SERVICE COMPANY)	File No. EB-02-IH-0386
)	
Licensee of Private Land Mobile Stations)	
WPBB209, WNXZ684, and WNXZ686)	
)	
FRESNO MOBILE RADIO, INC.)	File No. EB-02-IH-0681
)	
Licensee of Private Land Mobile Stations)	
WYY797, WYY798, WYY799, KNDC491,)	
and WNA511)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 2004

Released: March 18, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny motions filed by Nextel Communications, Inc. and/or Nextel Partners, Inc. ("Nextel") seeking revocation of licenses held by Private Land Mobile licensees C&W Communications, Inc., and its owner, Steve Gill (collectively "C&W"); Radio Service Company ("Radio Service"); and Fresno Mobile Radio, Inc. ("Fresno") (collectively referred to as the "Incumbent Licensees").¹ As discussed more fully below, we find insufficient basis upon which to commence license revocation proceedings against

¹ See Motion for Revocation of Licenses, filed on October 16, 2001, by Nextel against C&W ("Nextel/C&W Motion"); Motion for Revocation of Licenses, filed on April 15, 2002, by Nextel against Radio Service ("Nextel/Radio Service Motion"); and Motion for Revocation of Licenses, filed on June 14, 2002, by Nextel against Fresno ("Nextel/Fresno Motion").

the Incumbent Licensees for their alleged failure to negotiate with Nextel in good faith the relocation of their respective site-based systems to comparable spectrum in the 800 MHz band.²

II. BACKGROUND

2. In the mid-1990s, the Commission determined that a new framework for the licensing of 800 MHz licenses was appropriate.³ The Commission recognized that the advent of new technologies would permit licensees of wide area systems to achieve greater efficiencies than licensees operating small, site-based systems.⁴ As a result, the Commission concluded that it was in the public interest to allow licensees to operate wide area systems in certain Economic Areas (“EAs”) in the upper portion of the 800 MHz band and to relocate site-based incumbents to comparable frequencies in the lower portion of the 800 MHz band.⁵ By thus relocating licensees to other frequencies, the new EA licensee could utilize more efficient technologies and provide wide area service to more customers in competition with PCS and cellular providers.⁶ To accomplish this, the Commission established competitive bidding rules to award overlay licenses and to provide procedures for the auction winner to relocate incumbent licensees to comparable spectrum. The Commission determined that it was best to rely on market forces to accomplish the relocation and only in instances where the parties failed to reach an agreement and the EA licensee requested intervention would the Commission become involved and order involuntary relocation.⁷

3. Section 90.699 of the Commission’s rules⁸ establishes a mechanism whereby an EA licensee may arrange for the relocation of an incumbent licensee’s site-based 800 MHz system operating in the upper 800 MHz band to comparable spectrum in the lower 800 MHz band. The relocation procedures consist of a one-year voluntary negotiation period during which the EA licensee and the incumbent may negotiate any mutually agreeable relocation arrangement. If no agreement is reached by the end of the voluntary period, a one-year mandatory negotiation period commences, during which both the EA licensee and the incumbent must negotiate in

² The Commission does not recognize a formal right to seek revocation of a license. *See, e.g., In the Matter of MCI Telecommunications Corp.*, 3 FCC Rcd 3155 (1988); *KDSK, Inc.*, 93 FCC 2d 893 (1983). The Commission, however, has treated such requests as informal requests for action pursuant to section 1.41 of the Commission’s Rules, 47 C.F.R. § 1.41.

³ *Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of the SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act—Competitive Bidding, First Report and Order, Eighth Report and Order, and Second Notice of Proposed Rule Making*, 11 FCC Rcd 1463 (1995) (“*First R&O*”).

⁴ *First R&O*, 11 FCC Rcd at 1476-77.

⁵ *Id.*

⁶ *Id.*, 11 FCC Rcd at 1475.

⁷ *Id.*, 11 FCC Rcd at 1503-08. *See also Amendment of Part 90 to Facilitate Future Development in the 800 MHz Frequency Band, Second Report and Order*, 12 FCC Rcd 19079, 19110-17 (1997).

⁸ 47 C.F.R. § 90.699.

“good faith.” If no agreement is reached during either the voluntary or mandatory negotiation periods, the EA licensee may request involuntary relocation of the incumbent’s system.⁹

4. In 1997, Nextel purchased a number of EA licenses in the upper 800 MHz band in Auction No. 16,¹⁰ including licenses for channels used by the Incumbent Licensees. Nextel states that it timely notified each of the Incumbent Licensees of its desire to relocate their respective systems to comparable frequencies.¹¹ Nextel and each of the Incumbent Licensees engaged in negotiations during both the voluntary and mandatory periods;¹² however, the negotiations proved unsuccessful. According to Nextel, in each case, it requested technical information to facilitate the making of proposals and received either no response or less than sufficient information.¹³ Nextel states that it sent each of the Incumbent Licensees a request to meet face-to-face; however, none met personally with Nextel during either of the negotiation periods.¹⁴ Nextel claims that it made some relocation offers that went unanswered or that were rejected without adequate explanation.¹⁵ For example, Nextel maintains that Radio Service’s verbal rejections of certain of its offers lacked substance.¹⁶ Nextel asserts that Fresno’s responses lacked adequate technical detail that would have helped “to elucidate possible issues with the offer.”¹⁷ Nextel also argues that C&W erected roadblocks to negotiations by making unreasonable demands for warranties and assurances.¹⁸ Nextel suggests that a desire for greenmail, *i.e.* the desire that Nextel purchase their respective systems at inflated prices, motivated the Incumbent Licensees to stonewall relocation negotiations.¹⁹

⁹ 47 C.F.R. § 90.699(b) and (c).

¹⁰ See *Public Notice, 800 MHz Auction Closes: Winning Bidders in the Auction of 525 Specialized Mobile Radio Licenses*, 12 FCC Rcd 20417 (1997).

¹¹ Nextel notified C&W, Fresno and Radio Service of its intent to relocate their respective systems by letters dated January 19, 1999. Nextel/C&W Motion at 4; Nextel/Fresno Motion at 5; and Nextel/Radio Service Motion at 5.

¹² Nextel/C&W Motion at 5; Nextel/Fresno Motion at 5; and Nextel/Radio Service Motion at 5.

¹³ Nextel/C&W Motion at 6; Nextel/Fresno Motion at 6; and Nextel/Radio Service Motion at 5-6.

¹⁴ Nextel/Fresno Motion at 7-8; Nextel/Radio Service Motion at 6-7; and Nextel/C&W Motion at 13, 22. C&W asserts that despite Nextel’s letter, it was Nextel that was unwilling to meet to negotiate. C&W Opposition to Motion for Revocation of Licenses, filed November 7, 2001 (“C&W Opposition”), at 1.

¹⁵ Nextel/C&W Motion at 7-18; Nextel/Fresno Motion at 7-10; Nextel/Radio Service Motion at 6-8.

¹⁶ Nextel/Radio Service Motion at 6-7.

¹⁷ Nextel/Fresno Motion at 7.

¹⁸ Nextel/C&W Motion at 7-8.

¹⁹ Nextel/C&W Motion at 25; Nextel/Fresno Motion at 17; Nextel/Radio Service Motion at 5-6. In further support of its requests for revocation, Nextel maintains that it has successfully negotiated the relocation of approximately 1,000 incumbent site-based licensees to other spectrum and that the Incumbent Licensees are the only ones with whom negotiations have failed. Nextel/C&W Motion at 3; Nextel/Fresno Motion at 4; and Nextel/Radio Service Motion at 4.

5. Each of the Incumbent Licensees maintains that, while it may have failed to reach an agreement with Nextel, there was no absence of “good faith” on its part.²⁰ Radio Service and Fresno state that they rejected Nextel’s offers without detailed responses because Nextel’s offers to them did not provide for a “seamless” transition, discussed in the rulemaking proceeding²¹ as a requirement for involuntary relocation.²² C&W asserts that Nextel ignored its repeated requests for assurances for, among other things, a plan for seamless transition.²³ We note that each of the Incumbent Licensees retained counsel to negotiate on its behalf.²⁴ We also note that many of the details regarding the adequacy of the Incumbent Licensees’ responses are disputed issues of fact.

III. DISCUSSION

6. Under section 312(a) of the Act, “[t]he Commission may revoke any station license or construction permit . . . for willful or repeated violation of . . . any rule or regulation of the Commission authorized by this Act”²⁵ We note that the Commission’s discretion under section 312(a) to institute revocation proceedings is very broad. The Commission has held that initiation of revocation proceedings through an order to show cause, as permitted by section 312(a), “is, of course, wholly subject to our discretion. . . . Pursuant to the legislative intent behind 47 U.S.C. § 312 . . . the Commission has complete discretion, after considering allegations of noncompliance with our rules, even prima facie evidence of violations, to determine not to issue orders to show cause”²⁶ Indeed, within its “broad discretion in this area, the

²⁰ C&W Opposition at 10-13; Radio Service Opposition to Motion for Revocation of Licenses, filed September 16, 2002, at 13-18; and Fresno Opposition to Motion for Revocation of Licenses, filed October 1, 2001, at 3-5.

²¹ See *First R&O*, 11 FCC Rcd at 1510. With respect to involuntary relocation, the Commission stated:

In such a case, the EA licensee must: (1) guarantee payment of all costs of relocating the incumbent to a comparable facility; (2) complete all activities necessary for placing the new facilities into operation, including engineering and frequency coordination, if necessary; and (3) build and test the new system. Specifically, any relocation of an incumbent must be conducted in such a fashion that there is a “seamless” transition from the incumbents [sic] “old” frequency to its “relocated” frequency (that is, there is no significant disruption in the incumbent’s operations).

Id.

²² Fresno Opposition at 9; Radio Service Opposition at 9. Each incumbent asserts that most of Nextel’s offers provided an amount of compensation to “retune” the incumbent’s radio system, and did not provide for building a redundant system to allow a “seamless” transition for each incumbent’s customers, to which the incumbents believed they were entitled.

²³ C&W Opposition at 7.

²⁴ Nextel/C&W Motion at 6; Nextel/Fresno Motion at 5; and Radio Service Opposition at 10.

²⁵ 47 U.S.C. § 312(a).

²⁶ *Tulsa Cable Television*, 68 FCC 2d 869, 877 (1978).

Commission can refuse to issue an order to show cause based upon the petition of a third party even if it is determined that a violation of Commission rules exists.”²⁷

7. Applying this discretionary standard to the facts at issue, we find that the alleged misconduct is not sufficiently egregious to warrant the commencement of license revocation proceedings against any of the Incumbent Licensees. Section 90.699 of the Commission’s rules requires an EA licensee and an incumbent licensee to negotiate in “good faith” during the mandatory period. The Commission has determined that “good faith” is determined on a case-by-case basis.²⁸ In these cases, each of the Incumbent Licensees engaged counsel to negotiate on their behalf. Nextel appears to have had sufficient information to make offers to “retune” the Incumbent Licensees’ systems, and the Incumbent Licensees rejected such offers as not sufficiently “seamless.” Taken as a whole, we do not find that the conduct of the Incumbent Licensees was so grave as to raise questions about their respective basic qualifications to remain Commission licensees.²⁹

8. Nextel also claims, as a further basis for seeking revocation of licenses, that two of the three Incumbent Licensees failed to negotiate in “good faith” after the close of the mandatory negotiation period.³⁰ We find no merit to such allegations. The Commission’s rules place no obligation on incumbent licensees to negotiate beyond the one-year mandatory negotiation period.³¹

9. Notwithstanding our decision not to commence revocation proceedings, we are troubled by the failure of the Incumbent Licensees to meet face-to-face with Nextel and to

²⁷ *Humboldt Bay Video Co.*, 56 FCC 2d 68, 71 n. 9 (1975). See also *C.J. Community Services, Inc. v. FCC*, 246 F.2d 660, 664 (D.C.Cir.1957) (“When a violation of the Act has been shown, the Commission may revoke a station license, but under § 312(b), it also may impose a lesser sanction.”).

²⁸ See *In the Matter of Petition for Declaratory Ruling Concerning the Requirement of Good Faith Negotiations Among Economic Area Licensees and Incumbent Licensees in the Upper 200 Channels of the 800 MHz Band*, Memorandum Opinion and Order, 16 FCC Rcd 4882, 4884 (WTB 2001). The Wireless Telecommunications Bureau noted in this declaratory ruling, issued shortly before the close of the mandatory period in this case, that as part of each case-by-case determination, the Commission will generally apply the factors set forth in section 101.73 of the Commission’s rules. 47 C.F.R. § 101.73. These factors include whether the auction winner has made a *bona fide* offer of relocation, whether any premium demanded by the Incumbent is disproportionate to the cost of providing comparable facilities, what steps the parties have taken to determine the actual cost of relocation, and whether either party has withheld information necessary to estimate the cost of relocation.

²⁹ In light of this result, we will dismiss as moot two ancillary motions filed in these matters: Nextel’s Motion to Add a Candor Issue in the C&W proceeding filed on October 16, 2001 (relating to C&W’s representation that it provided almost all requested technical information despite its alleged failure to submit certain information regarding the “combiner” system C&W was utilizing), and Nextel’s Motion to Strike Fresno’s Further Opposition to Motion for Revocation of Licenses filed on November 19, 2002. We have reviewed the ancillary motions and conclude that nothing therein alters our decision to deny Nextel’s request to institute revocation proceedings for the alleged infractions of our rules.

³⁰ Nextel/Radio Service Motion at 8 and Nextel/Fresno Motion at 10.

³¹ See 47 C.F.R. § 90.699(b) and (c).

promptly provide technical information and substantive responses to Nextel. We take this opportunity to remind all licensees that we will, in the future, consider issuing monetary forfeitures against licensees who fail to fully meet their obligations to negotiate relocation in “good faith.”

10. We note that Nextel may request that the Commission order the involuntary relocation of each of these incumbent licensees – a procedure specifically embraced by the Commission and contemplated by section 90.699 when parties have failed to reach an accord during the two negotiation periods. We believe that a request for involuntary relocation, not the commencement of a license revocation proceeding, would produce the most expeditious result in this instance and serve the public interest, convenience, and necessity.

IV. CONCLUSION

11. IT IS HEREBY ORDERED THAT, pursuant to the authority in sections 0.111 and 0.311 of the Commission’s rules,³² the Motion for Revocation of Licenses, filed on October 16, 2001, by Nextel Communications, Inc. and Nextel Partners, Inc. against C&W Communications, Inc. and Steve Gill IS HEREBY DENIED.

12. IT IS FURTHER ORDERED THAT, pursuant to the authority in sections 0.111 and 0.311 of the Commission’s rules,³³ the Motion for Revocation of Licenses, filed on April 15, 2002, by Nextel Communications, Inc. and Nextel Partners, Inc. against Radio Service Company IS HEREBY DENIED.

13. IT IS FURTHER ORDERED THAT, pursuant to the authority in sections 0.111 and 0.311 of the Commission’s rules,³⁴ the Motion for Revocation of Licenses, filed on June 14, 2002, by Nextel Communications, Inc. against Fresno Mobile Radio Inc. IS HEREBY DENIED.

14. IT IS FURTHER ORDERED THAT, pursuant to the authority in sections 0.111 and 0.311 of the Commission’s rules,³⁵ the Motion to Add a Candor Issue, filed on October 16, 2001, by Nextel Communications, Inc. and Nextel Partners, Inc. against C&W Communications, Inc., and Motion to Strike Further Opposition to Motion for Revocation of Licenses filed by Nextel Communications, Inc. against Fresno Mobile Radio Inc. on November 19, 2002 ARE DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

³² 47 C.F.R. §§ 0.11 and 0.311.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*